

## DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

10,491

FILE: B-193821

DATE: June 18, 1979

MATTER OF: Pay for Holidays <sup>[Request By]</sup> - Seasonal Employees of IRS <sup>For Holiday Pay]</sup>

DIGEST: Seasonal employees of the Internal Revenue Service, who were hired during the tax return filing season and who were to be removed from the rolls when there was no longer work to be done, are not entitled to pay for the Memorial Day holiday on Monday, May 26, 1975, since there was no further work to be performed as of the end of the day shift on Friday, May 23, 1975. Those employees were not prevented from working on Memorial Day solely because of the occurrence of the holiday and are not entitled to pay for the holiday under 5 U.S.C. § 6104(3). 56 Comp. Gen. 393 and 45 id. 291 distinguished.

This decision, issued at the request of the Internal Revenue Service (IRS) and the National Treasury Employees Union (NTEU), concerns the entitlement of 57 employees of the Cincinnati Service Center - 1847 of the IRS to be paid for the Memorial Day holiday, May 26, 1975. The individuals involved are seasonal employees who were hired and assigned to night shift work during the income tax return filing season from January to May of 1975. Seasonal employees are hired only for so long as there is sufficient work for them to do and are taken off the rolls when there is no longer work to be done.

The IRS and the NTEU are in agreement as to the circumstances which gave rise to the employees' claims for compensation. In 1975, there was sufficient work to justify the continued employment of seasonal employees at the Cincinnati Service Center only through the end of the day shift of Friday, May 23. There was not enough work to justify the continued employment of any employee through the night shift of May 23. We understand that the employees had knowledge on that date that no further work was available and that they should not report to work thereafter. All seasonal employees were separated as of Tuesday, May 27, the day following the Memorial Day holiday of Monday, May 26, 1975. In reliance on our decision at 45 Comp. Gen. 291 (1965), the IRS paid all day shift employees who worked until the close of business on Friday, May 23, and all night shift employees who did not have at least 8 hours of annual leave as of May 23 were denied payment for the holiday.

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The NTEU filed a grievance on behalf of the 57 night shift employees, alleging that the denial of pay for the Memorial Day holiday to those employees violated a provision of the collective bargaining agreement in effect in 1975. The grievance was denied and on December 10, 1975, the NTEU invoked arbitration. Because of doubt as to whether the IRS could comply with an arbitration award of backpay for the Memorial Day holiday in favor of the 57 night shift employees, the question of entitlement was submitted to this Office in lieu of arbitration

In denying pay for the Memorial Day holiday to night shift workers who were in a nonpay status for the night shift of May 23, 1975, the IRS relied on language contained in 45 Comp. Gen. 291 (1965) indicating that, as a general rule, an employee has a legal right to be paid basic compensation for a holiday on which he is not ordered or directed to work, when he has been in a pay status for the full workday immediately preceding or succeeding the holiday. The NTEU points out that the holding in that case has been modified by 56 Comp. Gen. 393 (1977) which it cites for the proposition that an employee who is ready, willing and able to work on a day preceding or succeeding a holiday and is prevented from working solely because of a holiday is entitled to be paid for that holiday. In this regard, the NTEU notes that the 57 night shift employees were not separated until Tuesday, May 27, 1975, and, thus, were not relieved of their obligations to be ready, willing and able to work until May 27.

The NTEU's observation that our holding in 56 Comp. Gen. 393 modifies 45 Comp. Gen. 291 is correct. However, it does not overrule the principle for which 45 Comp. Gen. 291 is cited by the IRS. Rather, as indicated by the following excerpt, it extends that principle to situations in which an employee in a pay status either before or after a holiday is in an absent without leave status on the corresponding day immediately before or after the holiday:

"Our decision in 45 Comp. Gen. 291, supra, established a further category of circumstances in which it is to be presumed that an employee is 'relieved or prevented' from working on a holiday solely because of the occurrence of such holiday. In holding that there is no authority for denial of pay for a holiday when, in ordinary circumstances, an employee has been in a pay

status before or after a holiday, we extended the presumption of 18 Comp. Gen. 206, supra, to employees on authorized leaves of absence either immediately before or immediately after a holiday.

\* \* \* \* \*

" \* \* \* in the interest of uniformity and administrative convenience, we believe the rule stated in 45 Comp. Gen. 291, supra, should apply to employees in an absent-without-leave status immediately before or after a holiday. Thus, an employee in a pay status for either the workday preceding a holiday or the workday succeeding a holiday is entitled to straight-time pay for the holiday, without regard to whether he is in an authorized leave-without-pay status or an absent-without-leave status for the corresponding day immediately succeeding or preceding such holiday. Our decision in 13 Comp. Gen. 206, supra; 16 id. 807, supra; 18 Comp. Gen. 206, supra; and 45 Comp. Gen. 291, supra, are modified accordingly."

However, neither decision is dispositive as to the entitlement of the 57 night shift employees whose cases are here in issue.

With respect to pay for holidays, including the Memorial Day holiday, 5 U.S.C. § 6104 (1970) provides:

"§ 6104. Holidays; daily, hourly, and piece-work basis employees.

"When a regular employee as defined by section 2105 of this title or an individual employed regularly by the government of the District of Columbia, whose pay is fixed at a daily or hourly rate, or on a piece-work basis, is relieved or prevented from working on a day--

\* \* \* \* \*

"(3) solely because of the occurrence of a legal public holiday under section 6103 of this title, or a day declared a holiday by Federal statute, Executive order,

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or, for individuals employed by the government of the District of Columbia, by order of the Commissioner;

"he is entitled to the same pay for that day as for a day on which an ordinary day's work is performed." (Emphasis added.)

This same concept has long been applied to monthly and per annum employees. See 45 Comp. Gen. 291, 292 (1965).

Our holding in 56 Comp. Gen. 393 was intended to apply specifically to employees on the rolls on the day before and the day after a holiday. That holding is based on the language of 5 U. S. C. § 6104(3) and the presumption raised by an employee's pay status immediately before or immediately after a holiday that he is "relieved or prevented from working solely because of the occurrence of that holiday." It includes the following discussion:

"Those two decision [45 Comp. Gen. 291 (1965) and 18 Comp. Gen. 206 (1938) left agencies the discretion to indulge what presumption they reasonably might with respect to whether an employee in an absent-without-leave status immediately before or after a holiday is 'relieved or prevented' from working solely by the occurrence of that holiday. The result has been that different agencies have imposed different presumptions and, as in the cases of the Departments of the Army and Navy cited by the Chairman, have different instructions regarding pay entitlement for holidays.

"Since our decisions permit these differing results, we have further considered the matter. We now believe that it is as valid to presume that an employee who was absent without leave the day before a holiday would have been present on the holiday as it is to presume that he would have been present on the holiday when he is absent without leave on the day after the holiday."

Generally, where an employee is not in a pay status but is separated from the rolls on the day immediately after a holiday, he is entitled

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to pay for the holiday if he was in a pay status at the end of the working day immediately before the holiday. As indicated by our holdings in 45 Comp. Gen. 291 and 56 id. 393, the fact that a retiring employee is in a pay status immediately preceding the holiday entitles him to pay for the holiday based on the presumption that he is "relieved or prevented" from working on the holiday solely because of the occurrence of that holiday.

Where an employee is hired on a seasonal basis for only so long as there is work to be performed, there is no basis to presume that he was relieved or prevented from working solely because of a holiday where, in fact, there was no longer any work to be performed. In the particular case before this Office, the 57 seasonal employees at the Cincinnati Service Center would have been prevented from working on May 26, 1975, for lack of work and could have been separated at the close of business on the last day that the IRS had work for them. 34 Comp. Gen. 429 (1955). Thus, it cannot be presumed that they were "relieved or prevented" from working solely because May 26 was the Memorial Day holiday. Under these circumstances, the fact that their separations occurred on the day following the holiday is not controlling. This is not only true with respect to the 57 night shift employees, but pertains to the day shift employees who worked on May 23 and night shift employees who were carried in an annual leave status through the night shift on May 23, 1975. 56 Comp. Gen. 393 and 45 id. 291 distinguished.

In view of the statutory prerequisite to pay for holidays that the employee be "relieved or prevented" from working solely because of the occurrence of the holiday, the IRS correctly denied pay for the Memorial Day holiday of May 26, 1975, to the 57 night shift employees and incorrectly paid day shift employees and night shift employees with 8 or more hours of annual leave to their credit. However, since it would be against equity and good conscience to collect pay for the Memorial Day holiday from those employees who have been overpaid, and who are without fault in the matter, the overpayments are waived under 5 U.S.C. § 5584 (1976).

Acting

  
Comptroller General  
of the United States